

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD JOHNSON	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	
JOSEPH D. LEHMAN, ET AL.	:	No. 94-7583

MEMORANDUM AND ORDER

Shapiro, Norma L., J.

August 1, 2003

Petitioner, having filed a petition for writ of habeas corpus, sought leave to amend the petition to include a claim that the prosecutor failed to disclose evidence in violation of United States v. Bagley, 473 U.S. 667 (1985). Because judicial efficiency will be served by allowing petitioner leave to amend, the Report and Recommendation will be approved in part. The Motion to Amend will be granted.

Background

On October 28, 1991, following a jury trial in the Court of Common Pleas of Philadelphia County, Ronald Johnson ("Johnson") was found guilty of murder in the first degree, criminal conspiracy, and possession of an instrument of crime.

According to testimony at trial, on the evening of March 1, 1990, several people, interested in buying drugs from Joseph Goldsby, had gathered at 2100 Westmoreland Street. Goldsby was waiting in a car when two men arrived. One entered Goldsby's car to inspect the drugs, and the other remained outside. Shortly thereafter, shots were heard coming from inside

the car. When the individual outside the car tried to fire a gun, it misfired. The man inside the car with Goldsby exited and ran from the scene; Goldsby tried to chase him but collapsed. The individual outside the car also fled.

Several witnesses identified Johnson as the individual outside the car whose gun misfired. Johnson was arrested and inadvertently placed in the same cell as Mark Alan Jackson ("Jackson"), a Commonwealth witness and relative of Goldsby. At the time of trial, criminal proceedings were pending against Jackson in Florida. Jackson testified at trial that prior to his arrest, Johnson told Jackson to "be careful about what you say." (N.T. 10/24/91, 15). While they were held in the same cell, Johnson allegedly threatened to kill Jackson if Jackson testified against him. The Commonwealth agreed not to introduce evidence of Johnson's threat to Jackson in jail, in exchange for Johnson's agreement that counsel would not try to impeach Jackson by cross-examination regarding his pending criminal charges in Florida.

On direct appeal, Johnson claimed that trial counsel was ineffective for agreeing not to cross-examine Jackson about his criminal record in Pennsylvania and pending charges in Florida. On appeal, the decision was affirmed by the Superior Court and allocatur was denied by the Supreme Court. Petitioner then filed this habeas corpus petition. During discovery in this action, the Commonwealth disclosed for the first time a letter dated the day of Jackson's testimony from the Philadelphia assistant district attorney to the Florida prosecutor. The

letter advised the Florida prosecutor of Johnson's attempt to intimidate Jackson and Jackson's full cooperation with the prosecution, and asked for favorable consideration when the Florida prosecutor evaluated Jackson's pending charges.

Johnson's post-verdict counsel was not made aware of the letter, despite having "asked [the assistant district attorney who wrote the letter] for anything the DA had regarding Mr. Jackson."

(Letter from Johnson's Habeas Counsel to Magistrate Judge Faith Angell, 10/25/95 at 2 attached to Magistrate Judge Angell's Report and Recommendation.). As a result, there could have been no inquiry as to whether such a letter had been promised Jackson prior to that in return for his testimony inculcating Johnson.

Johnson, claiming violation of due process under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), filed a motion to amend his petition. The Commonwealth is required to provide the defense with potential exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963). This includes evidence to impeach on cross-examination. United States v. Bagley, 473 U.S. 667 (1985). The Commonwealth opposed Johnson's motion to amend because Johnson had not exhausted state remedies with respect to this claim. In his reply, Johnson argued that the requirement that he exhaust state remedies should be excused. The issue was referred to Magistrate Judge Faith Angell for a report and recommendation on the motion to amend.

Judge Angell found that the claim "ha[d] not been exhausted in the state court system," Report and Recommendation,

p. 4, because the Commonwealth only recently disclosed the letter. Petitioner has been prevented from raising this claim prior to the instant litigation. Judge Angell recommended that the court excuse Johnson's failure to exhaust state remedies, because such a decision would be in Johnson's interest, and the interest of judicial economy. She also recommended that this court hold an evidentiary hearing "to explore whether trial counsel made a specific or general request for information on Mr. Jackson's criminal history and whether trial counsel would have done anything different had he known about the . . . letter." Report and Recommendation, p 4-5. The Commonwealth, objecting to Judge Angell's Report and Recommendation, argued that judicial economy was not a proper basis for an exception to the exhaustion requirement.

DISCUSSION

28 U.S.C. § 2254 restricts the ability of a federal court to grant a habeas petition "of a person in custody pursuant to the judgment of a State court [to situations when] the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (1994). This requirement is not jurisdictional, but promotes comity and federalism by eliminating "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." Granberry v. Greer, 481 U.S. 129, 133 (1987) (quoting Rose v. Lundy, 455 U.S. 509, 515-16 (1982)). "The petitioner must afford each level of the state courts a fair opportunity to address the claim." Doctor v.

Walters, 96 F.3d 675, 678 (3d Cir. 1996). Petitioner has exhausted state remedies only if he has already presented the legal theory and supporting facts asserted in the federal habeas petition in a "substantially equivalent" form in state courts. Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir 1989).

Johnson does not dispute that state remedies have not been exhausted. He has presented in state court the claim that counsel was ineffective for agreeing with the Commonwealth not to cross-examine Jackson regarding his criminal history and pending criminal charges, but his Brady claim is that he was "deprived of his federal constitutional right to due process of law" because the Commonwealth failed to disclose this letter. Motion to Amend Habeas Corpus Petition, p. 2. Since the Commonwealth's determination of Johnson's ineffective assistance of counsel claims was not based on this Brady claim, he has not exhausted state remedies.

The Supreme Court has held that "there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion." Granberry, 481 U.S. at 131. The court "must exercise [its] discretion on a case-by-case basis and with reference to the values of, not only comity and federalism, but also 'judicial efficiency,' . . . and 'the ends of justice'." Smith v. Horn, 120 F.3d 400, 407 (3d Cir. 1997)(quoting Granberry, 481 U.S. at 135, Keller v. Petsock, 853 F.2d 1122, 127 & n.6 (3d Cir. 1988)). In determining whether a given situation

warrants this exception to the "strong presumption in favor of requiring [exhaustion]," Granberry, 481 U.S. at 131, a court considers whether the case presents particularly urgent circumstances, such as the imminent execution of the defendant, Christy v. Horn, 115 F.3d 201, 206-7 (3d Cir. 1997), or "whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state . . . court proceedings before reviewing the merits of petitioner's claim." Granberry, 481 U.S. at 134.

The alleged prejudice with regard to this claim is related to Johnson's ineffective assistance of counsel claim. Johnson's claim of ineffective assistance of counsel is that he was prejudiced by counsel's failure "to cross examine a key prosecution witness regarding bias from pending criminal charges." Petition for Writ of Habeas Corpus, ¶ 12B. He contends that "had trial counsel fully presented . . . this impeachment material to the jury, there existed a reasonable probability that the Petitioner would have been found not guilty." Objections of Petitioner to Report and Recommendations of U.S. Magistrate Judge, p. 2.

In order to prevail in the Bagley claim, petitioner must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). The Bagley court explicitly endorsed the application of "the Strickland . . . test . . . to cover . . .

cases of prosecutorial failure to disclose evidence favorable to the accused." Id. Johnson must make the same showing of prejudice to prevail on his ineffective assistance of counsel claim as on this Bagley claim. Johnson has already asserted the ineffective assistance of counsel claim before the state court. It found that Johnson had "failed to overcome his burden of establishing counsel's ineffectiveness, not to mention his burden of establishing actual prejudice." Philadelphia Court of Common Pleas Opinion, October 28, 1993, p. 9. Rather than force Johnson to litigate this related claim through the state courts, judicial efficiency is served by granting a waiver of the exhaustion requirement, and allowing Johnson to amend his petition to assert his Bagley claim now.

Judge Angell recommended that this court hold an evidentiary hearing to explore the breadth of counsel's request for Bagley information on Jackson, and the actions counsel would have taken if the letter had been disclosed. Rule 8 of the Rules Governing Section 2254 Cases in United States District Courts mandates that this court determine whether an evidentiary hearing is required. At this point it is unclear whether an evidentiary hearing will be necessary. If the court finds that a hearing is appropriate after receiving and considering the Commonwealth's answer to the amendment, one will be scheduled at that time.

CONCLUSION

Because the interest of judicial efficiency would be served by allowing Johnson to amend his petition, the Report and

Recommendation will be approved and adopted in part. The Commonwealth's objections to the Report and Recommendation will be overruled. The Motion to Amend will be granted. If it appears that evidentiary hearing is necessary, one will be scheduled at this time. An appropriate order follows.

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ORDER

And now, this 2nd day of December, 1997, upon consideration of petitioner's Motion to Amend, the government's answer in opposition thereto, the petitioner's reply to the government's answer, the Report and Recommendation of Magistrate Judge Faith Angell, and the government's objections thereto, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Angell is **APPROVED** and **ADOPTED IN PART**.
2. The Commonwealth's objections to granting the motion to amend are **OVERRULED**.
3. Petitioner's Motion to Amend is **GRANTED**.
4. Petitioner's Petition for Writ of Habeas Corpus is amended to include an averment that petitioner's federal constitutional right to due process of law, set forth in United States v. Bagley, 473 U.S. 667 (1985), was abridged by the failure of the District Attorney to disclose at the time of trial the letter on behalf of Mark Alan Jackson to the District Attorney's office of Marion County, Florida, dated October 24, 1991.
5. Respondent may respond to the claim added by the amendment on or before December 22, 1997.

J.